dated balance sheet and a consolidated profit and loss account for the company ending 31 December 1988.

Ms Kong for the company submitted that it was not fair for the petitioners to put in an affidavit of this nature at this very late stage of the hearing. In any event, she argued that the petition to wind up the company was based entirely on the fact that the company neglected to pay the debt demanded in the statutory notice. No other facts have been set out in the petition to wind up the company on the ground that it is generally insolvent, which the new affidavit now seeks to do.

Halsbury's Laws of England (4th Ed) 7(2) para 1058 states the following:

> *In his petition a petitioner must allege* and prove *the facts entitling him to present it*, showing that one or more of the grounds specified in the Involvency Act 1986 or in any other enactment for making a compulsory order exist. Unless these allegations are contained in the petition, it is misconceived, and the court will dismiss it. The court will not travel outside the allegations in the petition. (Emphasis added.)

Other than a bare statement in para 8 of the petition which reads 'alternatively the company is insolvent and unable to pay its debts' there is no other statement or allegation in the petition setting out facts to show that the company is generally insolvent. The affidavit filed by the petitioners at the eleventh hour was an attempt to introduce evidence on the company's general insolvency even though nothing on that is stated in the petition itself. I agreed with the submission of the counsel for the company that it would be grossly unfairly to permit the introduction of such facts by affidavit at that late stage. The company had hardly an adequate opportunity to rebut.

I think the following comments by Megarry J in *Re Fildes Bros Ltd*[12] at p 923 are most apt:

> In cases in which there are no normal pleadings, it seems to me important that those who oppose a winding-up should know, in time to prepare their case, what are the allegations that they have to meet. If after a petition has been presented the petitioner wishes to broaden his attack, let him first amend his petition.

Accordingly, I ruled that for the purposes of the hearing I would disregard that affidavit which was filed to persuade the court to wind up the company on the ground that it is generally insolvent.

Petition stayed.

Solicitors: *Chia Tan & Yek; Shook Lin & Bok.*

Reported by *Jeff Leong Pak Lim*

MALAYSIAN REPORTS

Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-36 OF 1990
LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND HARUN HASHIM SCJJ
27 DECEMBER 1990

Land Law — Recovery of possession of state land — Summary procedure — Not applicable where land held under licence — Rules of the High Court 1980, O 89

Civil Procedure — Summary procedure for recovery of the possession of state land — When applicable — Rules of the High Court 1980, O 89

In this case the forefathers of the appellants and other unnamed occupiers were pioneer settlers of the agricultural land in dispute. The appellants alleged that between 1971 and 1976 they and the others made application to the state authority for titles of the said land. There was evidence by affidavit and documentary exhibits to show that the Selangor State Executive Council had approved the alienation of the said land to the appellants and other selected settlers and on 1 November 1980, a member of the State Executive Council confirmed the approval and assured them that they would be given titles to the said land. Following the policy of the state government that only genuine and landless farmers would be given the land, only temporary occupation licences ('TOL') were granted to the farmers, on the understanding that separate titles to the land would be issued provided they continued to cultivate the land and remained with landless status. The appellants contended that after the expiry of the TOL period in 1984, since they and the other farmers had satisfied the conditions imposed by the respondent they have acquired legal right or expectation to be issued with land titles. The respondent however thought fit to hand over the lands to the Federal Land Consolidation and Rehabilitation Authority (FELCRA). The respondent on behalf of the state government applied summarily under O 89 of the Rules of the High Court 1980 for possession of the land without even offering any compensation relating to the eviction of the appellants and others from the land. The question at issue was the propriety of the application of the said O 89 to the facts and circumstances of this case. The learned judge of the High Court allowed the application of the respondent and the appellants appealed.

Held, allowing the appeal:

(1) The appellants in this particular case have sufficiently shown by affidavit evidence that they have an arguable case in that they and some, if not all, of the other farmers have occupied the said land for three years under licence and thereafter have remained in occupation with the continued consent of the state government by virtue of the alienation already approved prior to the TOLs.

(2) There are issues to be tried in this case which are not suitable to be decided by affidavit evidence. This case should not therefore have been dealt with summarily under O 89 of the Rules of the High Court 1980.

(3) For the purpose of the summary procedure under O 89 a distinction should be made between squatters simpliciter who have no rights whatsoever and occupiers with licence or consent, as well as tenants and licensees holding over.

(4) In this case the respondent has also failed to comply with r 3(b) of O 89 by his failure to disclose fully in its affidavit in support, the whole of the relevant circumstances how the lands came to be occupied by the appellants both before and after the three-year period of TOL and why the approval of the Executive Council to the alienation of the lands to the farmers was neither exhibited nor implemented.

[Bahasa Malaysia summary

Di dalam kes ini datuk nenek perayu dan lain-lain penduduk tanah adalah orang yang asal tinggal di tanah pertanian yang dipertikaikan. Perayu-perayu mendakwa bahawa antara tahun 1971 dan 1976 mereka dan orang-orang lain itu telah membuat permohonan kepada pihak berkenaan negeri untuk mendapat hakmilik tanah itu. Ada bukti yang diberi melalui afidavit dan surat-suratan yang menunjukkan bahawa Majlis Mesyuarat Kerajaan Selangor telah meluluskan pemberimilikan tanah itu kepada perayu-perayu dan penduduk orang lain yang dipilih dan pada 1 November 1980, seorang ahli Majlis Mesyuarat Kerajaan Negeri Selangor telah mengesahkan kelulusan itu dan mempastikan bahawa mereka akan diberi hakmilik tanah itu. Mengikut dasar kerajaan negeri bahawa hanya penduduk yang betul-betul petani yang tidak mempunyai tanah diberi tanah itu, hanya lesen pendudukan sementara telah diberi kepada petani-petani itu, dengan persetujuan bahawa hakmilik berasingan akan diberi jika mereka terus memajukan dan menanam atas tanah itu dan tidak mempunyai tanah lain. Perayu-perayu berkata bahawa selepas tamat lesen pendudukan sementara pada tahun 1984, oleh kerana mereka dan petani-petani yang lain telah mematuhi kepada syarat-syarat yang dikenakan oleh responden mereka telah memperolehi hak atau harapan di sisi undang-undang diberi hakmilik tanah itu. Sebaliknya responden telah memikirkan wajar tanah itu diserahkan kepada FELCRA untuk dimajukan. Responden bagi pihak kerajaan negeri telah membuat permohonan secara terus di bawah A 89 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk mendapat milikan tanah itu dengan tidak pun menawarkan apa-apa pampasan kepada mereka kerana diusirkan dari tanah itu. Soal di dalam kes ini ialah mengenai kewajaran penggunaan A 89 itu memandang kepada fakta-fakta dan keadaan kes ini. Hakim yang arif Mahkamah Tinggi telah membenarkan permohonan responden dan perayu-perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan:

(1) Perayu-perayu di dalam kes ini telah berjaya menunjukkan dari keterangan afidavit bahawa mereka mempunyai kes yang boleh dihujahkan oleh kerana mereka dan sebahagian walaupun bukan kesemua petani lain itu telah menduduki tanah itu untuk masa tiga tahun di bawah lesen dan selepas itu mereka telah terus menduduki atas tanah itu dengan persetujuan berterusan kerajaan negeri berdasarkan kepada pemberian tanah itu yang telah pun dipersetujui, sebelum lesen pendudukan sementara itu diberi.

(2) Terdapat isu-isu yang perlu dibicarakan di dalam kes ini yang tidak sesuai diputuskan atas keterangan afidavit sahaja. Kes ini tidak seharusnya diputuskan secara ringkas di bawah A 89 Kaedah-Kaedah Mahkamah Tinggi 1980.

(3) Untuk maksud acara ringkas di bawah A 89 itu, perbezaan harus dibuat antara penduduk tanah haram yang tidak mempunyai apa-apa hak atas tanah itu dan penduduk dengan lesen atau persetujuan, dan juga penyewa dan pemegang lesen, yang menduduki selepas tempoh masa.

(4) Di dalam kes ini responden juga telah gagal mematuhi kepada A 89 k 3(b) itu oleh kerana kegagalannya mendedahkan sepenuhnya di dalam afidavit sokongannya, semua keadaan yang bersangkutan yang menunjukkan bagaimana tanah itu dapat diduduki oleh perayu-perayu sebelum dan selepas masa tiga tahun lesen pendudukan sementara itu dan kenapa persetujuan yang diberi oleh Majlis Mesyuarat Kerajaan Negeri memberi hakmilik tanah kepada petani-petani itu tidak ditunjukkan atau dilaksanakan.]

Cases referred to

1 *Government of the State of Negeri Sembilan & Anor* v *Yap Chong Lan & Ors* [1984] 2 MLJ 123 (distd)
2 *Sidek bin Hj Muhamad & Ors* v *Government of the State of Perak & Ors* [1982] 1 MLJ 313 (distd)
3 *McPhail* v *Persons, Names Unknown* [1973] 3 All ER 393 (refd)
4 *Mohd Rawi bin Yaacob* v *Federal Land Development Authority* [1991] 1 MLJ (refd)

Legislation referred to

Rules of the High Court 1980, O 89

Appeal from: Originating Summons No 21-20-90 (High Court, Shah Alam)

GS Nijar (*Mohideen Abdul Kadeer* and *Meenakshi Raman* with him) for the appellants.

Mohd Hishamuddin bin Haji Yunus (Legal Adviser, Selangor) for the respondent.

Cur Adv Vult

Mohamed Azmi SCJ (delivering the judgment of the court): This appeal involves the interpretation of O 89 Rules of the High Court 1980 as relates the propriety of its application to the facts and circumstances of the respondent's claim for recovery of possession of state land from the appellants in Sabak Bernam in the state of Selangor. Apparently, the parcels of land were originally intended to be alienated to the appellants and other landless farmers who have been occupying and farming them for years, but the respondent now thought it fit to hand them over to the Federal Land Consolidation and Rehabilitation Authority (FELCRA), a statutory body, whose main function currently we are told is to rehabilitate abandoned agricultural land. The main issue before us is whether on the facts, the respondent ought to have sued the appellants by writ instead of by the summary procedure under O 89.

It is common ground that by originating summons dated 17 January 1990, the respondent applied under O 89 for an order to recover possession of the whole of the land identified as lots 3806 to 4522 against the six appellants and other persons in occupation of the state land at mukim Sungai Panjang in the District of Sabak Bernam. The body of the summons states that the grounds for application is that 'the plaintiff is entitled to possession and the defendants named herein and all those other persons in occupation are in occupation without licence or consent.' The fundamental issue is therefore the absence of either licence or consent.

The learned judge not only summarily granted the respondent order of possession but also made a consequential order whereby he ordered that the writ of summons and statement of claim filed by two of the aggrieved farmers (not the appellants) on 20 March 1990 vide Shah Alam High Court Suit No 21-226 of 1990 be consolidated with the O 89 proceedings, and be struck out forthwith. In that writ action, one Mokhtar bin Jaafar, a deponent in the O 89 proceedings, and one Mat Jani bin Ali Gasan, have sued the Pengarah Tanah dan Galian Selangor on behalf of themselves and all other persons in occupation of portions of the land in dispute, for a declaration that they are entitled in law and in equity to be in possession of the said land, and for other consequential orders. In making the order that he did, the learned judge after referring to two leading authorities of the Federal Court in *Government of the State of Negeri Sembilan & Anor* v *Yap Chong Lan & Ors*[1] ('the LESCO case') and *Sidek bin Hj Muhamad & Ors* v *Government of the State of Perak & Ors*,[2] took a swipe at counsel for the appellants in this pernicious term:

> 39 When the defences taken in this case were so absolutely sterile one needs to ask why they were solemnly put forward by officers of this court whose duty is to advise their clients on what the law is and not what in their or the clients' opinion it ought to be. Failure to give advance notice of legal points intended to be taken may be minor misdemeanours not in the best of the traditions of the Bar. But filing legal proceedings for relief where it is obvious that none exists is quite something else.

Be that as it may, we cannot help but be amazed at the long history of permitted occupation of lots 3806 to 4522 by the farmers and at the dispute on the approved alienation by the state authority to them under the National Land Code 1965. From the record of appeal there is hardly any question that the forefathers of the appellants and the other unnamed occupiers or some of them at least were pioneer settlers of the agricultural land in dispute. The land scheme comprises 717 lots each measuring three acres in area, but in this appeal we are concerned only with 515 of them, including the ones occupied by the appellants. Under what circumstances, the land authority has debilitatingly acquiesced or consented to this pioneering activities, we are not at all clear. But between 1971 and 1976, the appellants alleged that they and the others did make application to the state authority for titles to the said land. There is some evidence by affidavit and documentary exhibits to show that on or about 4 September 1980, the Selangor State Executive Council, no doubt acting under the National Land Code 1965, had approved the alienation of the said land to the appellants and the other selected settlers, and on 1 November 1980, one Dato' Haji Kamarulzaman bin Haji Ahmad, the then member of the State Executive Council, had personally confirmed the approval and assured them that they would be given titles to the said land. It would appear that the policy of the state government was to ensure that only genuine and landless farmers would be given the lands, and for this purpose notwithstanding the approved alienation, administrative conditions which we think are both fair and reasonable were imposed by the respondent whereby for the first three years, only temporary occupation licences would be granted to the farmers, after which separate titles to the land would be issued provided they continued to cultivate the said land and remained with landless status. It is the contention of the appellants that after the expiry of the TOL period in 1984, since they and the other farmers have satisfied the post alienation conditions administratively imposed by the respondent, they have acquired legal right or expectation to be issued with land titles, and as such the respondent who is suing on behalf of the state government is not entitled in law to shoo them away summarily under O 89 as trespassers pure and simple without even any right to compensation relating to their eviction from the land. They claim that they are not squatters of state land in the popular and normal sense, but are either licensees holding over or lawful occupiers of state land with the continued consent of the State Executive Council under the approved alienation. If their occupation of the land is with the continuing consent, implied or expressed, of the state authority, then notwithstanding the expiry of their TOLs, O 89 is not the proper procedure to be adopted.

Rules (1), (2) and (3) of O 89 which came into force on 30 March 1984 provide:

> (1) Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.
>
> (2) The originating summons shall be in Form No 8A and no acknowledgement of service shall be required.
>
> (3) The plaintiff shall file in support of the originating summons an affidavit stating —
>
> (a) his interest in the land;
> (b) the circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises; and
> (c) that he does not know the name of any person occupying the land who is not named in the summons.

Mr GS Nijar, counsel for the appellants, has reminded us that O 89 is a reproduction of the English O 113 and has referred to the following commentary in *The Supreme Court Practice 1988* (Vol 1) at pp 1470-1471:

> For the particular circumstances and remedy described in r 1, this Order provides a somewhat exceptional procedure, which is an amalgam of other procedures, eg procedure by

ex parte originating summons, default procedures and the procedure for summary judgment under O 14. Its machinery is summary, simple and speedy, ie it is intended to operate without a plenary trial involving the oral examination of witnesses and with the minimum of delay, expense and technicality. Where none of the wrongful occupiers can reasonably be identified the proceedings take on the character of an action in rem, since the action would relate to the recovery of the res without there being any other party but the plaintiff. On the other hand, like the default and summary procedures under O 13 and O 14, this Order would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try, ie where there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land or as to wrongful occupation of the land without licence or consent and without any right, title or interest thereto.

In our view, the appellants in this particular case have sufficiently shown by affidavit evidence that they have an arguable case in that they and some, if not all, of the other farmers have occupied the land for three years under licence and thereafter have remained in occupation with the continued consent of the state government by virtue of the 1980 alienation already approved prior to the TOLs. The learned State Legal Adviser, Encik Hishamuddin for the respondent, pointed out that the TOLs and therefore consent were given only up to 1983. After that no TOL was issued, thus indicating absence of consent. In our view, the alleged continued consent of the state government to their occupation notwithstanding the expiry of the TOLs, is one of the serious issues to be tried. The case for the appellants is that they were already in occupation with consent prior to 1981 and the grant of TOLs from 1981 to 1983 is merely part of the chain of events supporting the existence of an approval of alienation of the lands to them by the state authority under s 42 of the National Land Code 1965, and pending issue of titles under s 77(2) they are entitled to remain on the land not as squatters but as of right. The approval of the state authority as exhibited by the appellants, would appear to have been made on 4 September 1980, according to the letter of the Collecter of Sabak Bernam dated 25 October. The opening paragraph of the letter at p 95 of the appeal record reads:

> Merujuk kepada perkara tersebut di atas, dimaklumkan bahawa permohonan tuan/puan ke atas tanah di Rancangan tersebut di tas telah diluluskan oleh Majlis Mesyuarat Kerajaan Negeri pada 4 September 1980.

We are therefore of the opinion that there are issues to be tried in this case which are not suitable to be decided by affidavit evidence. We accordingly agree that this case should not be dealt with summarily under O 89. Counsel for the appellants has rightly referred to the position of licensees holding over as distinct from squatters in the following judgment of Lawton J in *McPhail* v *Persons, Names Unknown*[3] at p 401:

> It follows, in my judgment, that squatters were never able to enlist the aid of the Court of Chancery to resist a writ of possession and they cannot now. The position of tenants and licensees holding over may be different. I have not thought it necessary to consider the jurisdiction of the court to stay execution in such cases.

In allowing the respondent's application under O 89, the learned judge had relied almost entirely on the *LESCO* case[1] and *Sidek*'s case.[2] With respect, these two decisions of the Federal Court are no authorities for the scope and application of O 89. In our opinion, for the purpose of the summary procedure, a distinction should be made between squatters simpliciter who have no rights whatsoever, and occupiers with licence or consent, and as well as tenants and licensees holding over. It may be impossible to establish the existence of any triable issue in the case of bare squatters, but the position of tenants and licensees holding over, or persons occupying with implied or expressed consent of the owner may be different. On the facts, we hold that there are triable issues on the absence of either licence or consent as alleged by the respondent. Evidence viva voce is required not only on the alleged consent of the respondent to the appellants' occupation rendering their entry lawful, but also on whether the approval of the state authority to the alienation of the lands to the appellants and the other occupiers had been given in 1980 under s 42 of the National Land Code 1965. In this case, we also find that the respondent has failed to comply with r 3(b) of O 89 by its failure to disclose fully in its affidavit-in-support, the whole of the relevant circumstances how the lands came to be occupied by the appellants both before and after the three-year period of the TOL, and why the approval of the State Executive Council to the alienation of the lands to the farmers as contained in the collector's letter of 25 October 1980, was neither exhibited nor implemented.

Finally, it has come to our knowledge that recently in *Mohd Rawi bin Yaacob* v *Federal Land Development Authority*,[4] another panel of this court (Abdul Hamid LP, Gunn Chit Tuan, and Jemuri Serjan SCJJ), had in allowing an appeal held that where the entry to the land is lawful, and where there are triable issues, O 89 is not the proper procedure to be adopted to evict occupiers by order for possession.

We have therefore allowed this appeal with costs, by setting aside the order of the High Court, including the striking out order of Shah Alam High Court Suit No 21-226 of 1990, with liberty to the respondent to proceed afresh with the claim for possession by writ.

Appeal allowed.

Solicitors: *Meena, Thayalan & Partners.*

Reported by *Prof Ahmad Ibrahim*